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No. 04-28

IN THE

Supreme Court of the United States

DAWN AKERS, KIM LORANGER, AND UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 6000,
Petitioners,

v.

PATRICIA L. CARUSO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY BRIEF

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The respondents cannot dispute the compelling reasons for granting certiorari in this case. They can point to no misstatements of law or fact in the petition. They cannot deny that there is an unusually mature circuit split on one central and squarely presented issue or that there is worsening chaos in the circuits on the other. Nor can they deny the national importance of clear standards to govern analysis of the free association rights of public employees.

Thus bereft of pertinent arguments on the question before the Court, the respondents engage in marginal and half-hearted skirmishes over the merits of their no-contact rule.

For example, they correctly observe that some of the people with whom petitioners are denied contact are offenders. Indeed, the phrase "convicted felons" appears three times on the first page of their argument. If the petition is granted, the correctional context here will no doubt inform the Court's application of constitutional principles to the facts at hand. However, the problem currently facing all public employees and employers, regardless of workplace setting—not to mention litigants and lower courts—is that the principles themselves are in doubt. That is the basis on which certiorari ought to be granted.

In any event, no legal or logical discussion accompanies the respondents' redundant incantation of "convicted felons." The respondents do not acknowledge that Michigan offenders range from those convicted of drunk driving and relatively minor property offenses to those convicted of far more serious matters; that many of the petitioners are clerical employees, social workers, and other human services providers without penological authority; or that the very large majority of the prohibited class consists of offenders' family members and visitors, individuals by definition guilty of no offense. Further, even as to offenders, the respondents do not explain the state's interest in preventing, for example, a clerical employee from attending a PTA meeting where another parent is on probation or a math instructor from attending a meeting to discuss the recent election with a neighbor who is on parole. In short, the respondents have made no real effort to defend this plainly overbroad rule.[1]

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[1] The respondents suggest that the petitioners are making a facial challenge to the rule and that the Court should deny certiorari due to the allegedly low chances of success of such a challenge. This suggestion is without merit. First, as has been clear and explicit since the complaint was filed, the petitioners are challenging the rule both on its face and as applied. Second, the named individual petitioners—Akers and Loranger—have suffered cognizable injuries. Loranger continues to suffer

In another premature gesture toward the merits, the respondents factually distinguish from the case at bar two circuit cases that illustrate the split over the application of the *Connick* public concern threshold to free association claims. *Connick v. Myers,* 461 U.S. 138 (1983). The respondents inform the Court, for instance, that *Boddie v. City of Columbus,* 989 F.2d 745 (CA5 1993), involved a firefighter. That factual point is a non sequitur. What matters here is that the Fifth Circuit, like the Eleventh Circuit, has held that the *Connick* public concern threshold does not apply to free association cases, in direct conflict with the Sixth Circuit in this case and the Second and Seventh Circuits in other cases. The respondents attend to neither this lack of uniformity nor to the consequent need for review by this Court.

Not even by implication do the respondents venture to engage the other issues presented by this case. However, as set forth in the petition, the contours of the intimate association rights of public employees and the use of broad prophylactic regulations in the free association context are critical issues requiring clarification; the former has been the subject of growing uncertainty and confusion for twenty years.

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the infringement of her First Amendment rights and the prospect of additional injuries in the future. Third, UAW Local 6000 has representational standing to challenge the broad range of threatened constitutional injuries faced by its numerous members (not to mention the injuries already wrought by the rule). Fourth, the "hypotheticals" to which the respondents refer in their brief in opposition are in fact past and threatened harms supported by sworn testimony—including the testimony of respondents' own officials. Finally, it is completely proper for the Court to entertain hypotheticals that demonstrate the substantial over-breadth of the rule, which is indeed facially invalid.

CONCLUSION

The inability of the respondents to address the *Connick* split and the other important First and Fourteenth Amendment questions implicated here makes it even plainer that the petition for a writ of certiorari should be granted.[2]

Respectfully Submitted,

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[2] As noted by the respondents and confirmed by the Office of the Clerk, the name of this case is now *Dawn Akers et al. v. Patricia Caruso, et al.* S. Ct. Rule 35.3.